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NO.: 95-324

Supreme Court, U.S.
FILED
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**IN THE
SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1995

STATE OF MICHIGAN
PETITIONER,

-vs-

FRANK GARCIA
RESPONDENT.

RANDY O. COLBRY, P33053
Prosecuting Attorney
Shiawassee County, Michigan
310 N. Shiawassee Street
Corunna, MI 48817
(5176) 743-2373

ARNOLD D. DUNCHOCK, P13013
Attorney for the Respondent
LAWYERS' OFFICES
223 N. Shiawassee Street
Corunna, MI 48817
(517) 743-5621

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

SUBMITTED BY:
ARNOLD D. DUNCHOCK (P13013)
ATTORNEY FOR THE RESPONDENT
LAWYERSS' OFFICES
223 N. SSHIAWSSEE STREET
CORUNNA, MI 48817
(517) 743-5621

35 pp

QUESTION PRESENTED

Should this Court deny certiorari where a state court has exhaustively decided a case is accordance with its law that is in harmony with and meets the standards of the clear and controlling law, two unanimous decisions of the United States Supreme Court as to implied acquittal precluding retrial as to lesser offenses, but which decision is independently justifiable according to the well settled collateral estoppel doctrine and the same transaction test, but also since the Defendant was literally twice placed in jeopardy?

TABLE OF CONTENTS

	PAGE
Question Presented.....	i
Index to Appendix.....	iii
Index to Authorities.....	iv
Response to Petition for Certiorari to the Supreme Court of the State of Michigan.....	1
Counter Statement of Facts.....	2-4
Reasons for Denying Writ.....	5-20
Conclusion.....	21
Appendix.....	1a-9a

(INDEX TO APPENDIX)

		PAGE
1.	(People's) Application for Leave to Appeal and Concise Statement of Proceedings and Facts (Filed with the Michigan Supreme Court in 1988) POINT: The Prosecutor took the position before the Michigan Supreme Court that the jury was properly instructed.....	1a
2.	Michigan Court of Appeals Decision dated October 19, 1988, Reversing Verdict in Trial One (1).Garcia 88 POINT: The Court of Appeals holding related to the lack of a jury option of not guilty; it did not make a holding relating to a jury option allowing verdicts of both second degree murder and armed robbery.....	2a
3.	Trial One (1) Vol. VIII Pages 127 and 128 POINT: The Prosecutor did not object to the verdict options given to the jury.....	3a-4a
4.	Prosecutor's Answer: Motion to Quash POINT: Prosecutor agreed Garcia could not be retried on first degree murder. Prosecutor thought Garcia waived claim of double jeopardy relating to armed robbery.....	5a-6a
5.	Trial One (1) Vol. VIII Pages 136 and 137 POINT: The jury asked a question resulting in the judge explaining that armed robbery was the difference between first degree felony murder and second degree murder.....	7a-8a
6.	Trial One (1) Vol. VIII Page 6 POINT: The Prosecutor moves to have the Court instruct on armed robbery because it is such an integral part of the case.....	9a

(INDEX TO CASES & AUTHORITIES)

CASES	PAGE
Garcia 88,CA 94233 (Oct. 19, 1988).....	7,16,17
Garcia 94, 203 Mich App 420, 513 NW2d 425 (1994).....	9,11
Grady v Corbin, 495 US 508, 109 L Ed 2d 548, 110 S Ct 2084.....	17
Green v United States, 355 US 184, 2 L Ed 199, 78 S Ct 221 (1957)	10,12,19
Harris v Oklahoma 433, US 682, 53 L Ed 2d 1054, 97 S Ct 2260 (1980)	11,12,13
Illinois v Vitale, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980)	11
Payne v Virginia, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 656 (1969).....	11,12,13
People v Deneweth, 14 Mich App 604; 165 NW2d 910 (1968).....	10,11
Sekou v Blackburn, 796, F2d 108 (CA5 1986)	11
UNITED STATES v LONG, 463, US 1032 (1983)	5

NO.: 95-324

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995'

State of Michigan,
Petitioner

-vs-

Frank Garcia,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR
A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

NOW COMES Frank Garcia by Arnold D. Dunchock of LAWYERS' OFFICES and prays that a Writ of Certiorari will not issue to review the Judgement of Supreme Court of the State of Michigan filed on April 18, 1995, rehearing denied, May 30, 1995, which upheld a Michigan Court of Appeals decision reversing Respondent's conviction for a crime of armed robbery on double jeopardy grounds.

(COUNTER STATEMENT OF FACTS)

TRANSACTIONAL:

The Petitioner herein substantially cites the facts cited by the Michigan Court of Appeals, but does not accept the legal conclusions of the Panel. The Respondent's position opposes the Petitioner's position.

The facts indicate Co-Defendant, Ronald Hammond, entered a car driven by the eventual victim, Timothy Kiley, for the purpose of joyriding. Frank Garcia, the Defendant herein, unwillingly entered the car.

The victim died as a result of an accidental shooting by Ronald Hammond. There is absolutely no evidence that Frank Garcia contributed to the killing of Timothy Kiley.

PROCEDURAL:

A jury trial was held and the jury had, among other options, options of two counts that related to armed robbery. The first option was armed robbery as the underlying felony for the first degree felony murder charge. The jury also had an option to find the Defendant guilty of armed robbery through a free standing verdict option of armed robbery.

The Michigan Court of Appeals reversed the verdict of second degree murder, holding that the jury had not been afforded an option of a general verdict of not guilty, because of a defective

jury verdict form as well as defective instructions. The Prosecutor did not criticize the jury verdict form; instead the Prosecutor argued forcefully to the Michigan Supreme Court in 1988 that the verdict form was quite satisfactory. [App 1a]

Prior to the second trial the Defendant filed a Motion to Quash. The Petitioner correctly states that the trial judge granted the Motion. The prosecution fails to state the trial judge began his decision by discussing double punishment and then ended his decision, by using a literal interpretation of what the Court of Appeals said to justify the granting of the Motion to Quash.

Although it is true that the Prosecutor appealed to the Michigan Court of Appeals, the Michigan Court of Appeals indicated that their prior opinion did not preclude a retrial on armed robbery. What the Prosecutor fails to mention was that the Michigan Court of Appeals decision was based on answering the peculiar language of the trial court's opinion.

The Defendant was retried for second degree murder, and possession of a firearm during the commission of a felony, but was acquitted on both; the Defendant was convicted of armed robbery.

The Michigan Court of Appeals vacated the verdict regarding armed robbery holding retrying the Defendant on armed robbery violated his protections against double jeopardy.

The appeal to the Michigan Supreme Court by the Prosecutor was the third time the Prosecutor had initiated an appeal in this

cause. The Michigan Supreme Court affirmed, and after a Petition for Rehearing by the Prosecutor reaffirmed the result reached by the Court of Appeals. Those voting to affirm the result based their decision on the doctrines of implied acquittal, collateral estoppel and the same transaction test.

(REASONS FOR DENYING WRIT)

I.

There are some preliminary considerations that, in and of themselves, warrant a determination this is not a case justifying the granting of a Writ of Certiorari.

This matter was tried twice within the State of Michigan; there have been five appellate reviews/decisions, plus a re-hearing by the Michigan Supreme Court. The State of Michigan exhaustively, if not fully, considered this matter before rendering its final decision.

The decision is based on Michigan law. See **Long v United States** 463, US 1032 (1983). While the Respondent recognizes that the United States Supreme Court can review a decision of a state's highest court, the situation is different than the review of a decision commenced within the federal system. A state is allowed the latitude of rendering a decision which is more protective of United States Constitutional Rights than required under a minimal federal standard.

The facts are further that the Defendant was incarcerated from December 6, 1985 until June 13, 1995, but that he has been released since that time. The points being that this matter has been fully litigated by the Michigan Court System; if the United States Supreme Court eventually grants the ultimate and full relief sought by the Prosecutor, there would be the further anomaly of someone

being returned to prison after a State's Supreme Court agreed with a State's Appellate Court that the Defendant should not have ever been re-tried on armed robbery, but even so was incarcerated for an additional six years. As the Respondent understands it, even if Certiorari was granted there would be a further period of uncertainity and seeming chaos as to whether the Defendent was or was not a convicted felon and whether he was or was not going to stay or return to prison. This would be harsh and cruel to the Defendant. This case is sui generis. Granting of this Writ would tend to create confusion and disrespect for the American Judicial System.

II

The appeal to the Michigan Supreme Court, like the Petition to this court, was at the behest of the Prosecutor, rather than the Defendant. That this is a prosecutorial petition, considered together with some actions and inactions of the Prosecutor provides a basis for not granting the Writ. The Prosecutor's actions are far worse than a mere failure of the Prosecutor to properly preserve an issue. Instead, this is a case where the basis that the Prosecutor is claiming for relief is contraindicated by the procedural facts of this case.

It is important to note what the reversible error was at the first trial; it was not the error the Petitioner claims as a basis for discrediting the implied acquittal doctrine basis as a justification for the reversal of the jury verdict in trial one.

The instructional error was that the trial judge did not afford the jury the option of a general verdict of not guilty or alternative options of not guilty to the individual options of guilty put to the jury. That that was the instructional error is evidenced by the the following language in the Michigan Court of Appeals decision entitled **Garcia 88**, CA 94233 (Oct. 19, 1988): [App 2a]

The transcript of trial one reveals the Prosecutor failed to object to the jury not having a full opportunity to decide. [App 3a-4a] Instead, the jury was discharged without the Prosecutor raising this as an objection.

While the Prosecutor had sought a conviction for first degree murder, there is no evidence that it even occurred to the Prosecutor after the verdict for second degree murder was read to be disappointed that there was not another finding of guilty as to armed robbery. In Michigan first degree felony murder mandates a life sentence without elgibility for parole. Second degree murder and armed robbery, either or both, are life sentence charges, but which allow for parole. Shiawassee County is a one Circuit Judge county, meaning there is only one judge's propensities to know. It was well known that the judge was going to and did sentence the Defendant to life imprisonment. The Defendant had only his one life to serve even if the court would have sentenced him to a time greater than what he had already been sentenced.

To the contrary, the positions taken by the Prosecutor soon thereafter provided further confirmation of the mindset of the

Prosecutor after the verdict was read and before the jury was discharged in the first trial. The Prosecutor argued to the Michigan Supreme Court in 1988 that the jury verdict form in trial one was quite acceptable; the Prosecutor argued there was nothing wrong with the jury verdict form, or the verdict of second degree murder, when they attempted to argue forcefully for a reinstatement of the verdict of second degree murder. Nowhere in that appeal to the Michigan Supreme Court did the Prosecutor so much as articulate what they now claim is a glaring instructional error; the Prosecutor certainly did not complain that the jury did not have a full opportunity that might have resulted in an additional verdict of armed robbery.

The point of the Defendant is that this is beyond a matter of the Prosecutor failing to preserve the issue of what they now claim is instructional error, warranting a negating of the Constitutional protection against double jeapordy. Rather, this is a matter of the Prosecutor attempting to mislead the United States Supreme Court by reversing the position, previously taken.

The Prosecutor in opposition to the Defendant's Motion to Quash before the second trial agreed that the Defendant would be barred from a retrial on first degree murder based on double jeapordy; but the Prosecutor erroneneously believed that the Defendant had waived his right to claim double jeopardy as it applied to armed robbery because the Prosecutor believed that the reversal of the second degree murder conviction allowed a retrial

as to armed robbery. [App. 5a-6a]

Instructional error in trial one was not a concern voiced by the Prosecutor in response to the Defendant's appeal, raising double jeopardy, after trial two. The position which the Petitioner now claims as a basis for reversing the decision of Michigan's highest court was not raised before the Michigan Court of Appeals decision, **Garcia 94**, 203 Mich App 420, 513 NW2d 425 (1994), vacating the verdict of armed robbery in the trial two. The Prosecutor did not specify what the supposed evil of the full opportunity was until the point was raised by a Justice of the Michigan Supreme Court, during oral arguments. The Prosecutor stated thereafter that the lack of full opportunity referred to the option to convict for both second degree murder and armed robbery. The Prosecutor, Randy O.Colbry, who made the statement about the supposed defect was the second Prosecutor to succeed the Prosecutor, David McClernan, who was the Prosecutor present when instructions were given during the first trial.

The Respondent's position is that the argument most highly stressed by the Petitioner was not based on a real wrong noted by the Prosecutor at the time of the rendering of the verdict in the first trial; instead this is a distant afterthought voiced by someone other than the Prosecutor who tried the first trial.

The Petitioner argues that the doctrine of implied acquittal should not have been applied herein as instructional error at the Defendant's first trial prevented the jury from actually

adjudicating the merits of the lesser included offense sought to be strickened at the retrial. As has been elaborated, there was no concern at the relevant time by the Prosecutor for the first jury to have been able to add a verdict of armed robbery to the verdict of second degree murder. But whether there could have or even was a possible objection, it was not preserved by the Prosecutor and therefore should not be a basis for reviewing double jeopardy here. The record is clear that the only instructional error did not relate to the possibility of an extraneous jury option for armed robbery: The instructional error was, and only was, that the jury was not afforded an option of a general verdict of not guilty or an option of not guilty for every possible guilty option. There is not a preserved factual basis for the Petitioner's position that instructional error prevented implied acquittal from being operable.

Turning to the analysis of legal authority, even the Petitioner concedes that the doctrine of implied acquittal is a valid doctrine and is a valid basis for precluding retrial in certain circumstances. **Green v United States**, 355 US 184, 2 L Ed 199, 78 S Ct 221 (1957) holds that conviction on a lesser offense precludes re-prosecution on a higher offense based on the doctrine of implied acquittal. The Prosecutor clearly acknowledged his acceptance of **Green** since the Prosecutor did not attempt to retry Garcia on first degree felony murder after the verdict of second degree murder was overturned by the Michigan Court of Appeals in 1988. The equivalent of **Green** in Michigan was and is **People v**

Deneweth, 14 Mich App 604; 165 NW2d 910 (1968).

The Petitioner's challenge to the doctrine of implied acquittal is limited to the application of implied acquittal as precluding retrial as to a lower offense. The two United States Supreme Court cases that control are **Harris v Oklahoma** 433, US 682, 53 L Ed 2d 1054, 97 S Ct 2260 (1980) and **Payne v Virginia**, 468, US 1062; 1041 S Ct 3573; 82 L Ed 2d 802 (1984). The Petitioner concedes on page 41 that double jeopardy bars prosecution for both felony murder and the underlying felony. The Respondent's view is that the Petitioner's concession is only partially acurate as **Harris** barred retrying of the underlying felony after conviction for the higher felony. The Petitioner does not directly attack **Harris/Payne**. This is significant since the Michigan Supreme Court decision was split, such that the well written opinion of the Michigan Court of Appeals **Garcia 94**, stands. And the legal cornerstone of **Garcia 94** is **Harris/Payne**. The Petitioner instead relies on **Illinois v Vitale**, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980) and **Sekou v Blackburn**, 796, F2d 108 (CA5 1986). **Vitale** and **Sekou** do not invalidate **Harris** as it applies to **Garcia** as they are more in the nature of double punishment cases rather than sucessive prosecution cases. The Respondent recognizes that **Harris** and **Payne** are sucessive prosecution after conviction cases, but they are indistingishable from sucessive prosecutions after acquittal under general principles of double jeopardy law. The Petitioner has provided no case authority underminig that **Harris/Payne** would apply to a sucessive prosecution after acquittal

as well as after conviction.

The Petitioner makes reference to the language in **Green**, qualifying the application of implied acquittal to those situations where the jury has had a full opportunity to render a decision. The Petitioner attempts to use **Green** as a basis to undermine the **Harris/Payne** doctrine and the reliance on that doctrine by the Michigan Supreme Court. Even if there had been a factual basis, which there is not here, **Green** has been improperly cited as authority for the position advanced by the Petitioner. What the Petitioner is actually seeking here is a reversal of **Green**, which again is clearly not warranted here.

The first **Garcia** jury did have a full opportunity to convict **Garcia** of first degree felony murder, second degree murder and armed robbery. What was the fatal defect was that the jury did not have a full opportunity to acquit. Again the mouthing of a concern that the jury did not have an alternative of both second degree murder and armed robbery is neither genuine, nor well preserved.

It is hard to imagine a worse set of facts upon which to claim lack of a full opportunity for a jury to decide. The opportunity that was not fully presented to the jury was to acquit. To say this is the kind of compelling situation that would warrant negating the clear language of the double jeopardy clause is absurd.

While there were multiple doctrines, each lending further

support to the other as a basis for the ultimate decision, the doctrines can and do on an individual basis provide an ample basis for not disturbing the final determination of the Michigan Courts on **Garcia**.

III.

The Petitioner makes reference in their Question Presented that there is a need:

> ....to clarify double jeopardy jurisprudence where the decisions throughout the country on the quetion of whether the doctrine of "implied acquittal" operates to preclude a retrial of lesser-included "preedicate" offense which operates to aggravate a greater offense ...

The Position of the Respondent is the Petitioner has failed to specify what about double jeopardy needs to be clarified. References are also made to a "disarray" relating to the doctrine of "implied acquittal" however, there is a failure to cite just what cases are in "disarray" in relation to what other cases.

There is no "disarray". The United States Supreme Court has spoken clearly and unanimously in two cases that control. Those cases are **Harris** and **Payne**.

IV.

A position of the Respondent is that based on the preliminary considerations and based on the showing that there is not a basis for reversing the implied acquittal doctrine as applied by the

Michigan Supreme Court, there really is no reason justifying an exhausted analysis of the doctrines of collateral estoppel and the same transaction test. What has been stated so far should be sufficient to warrant a denial of the Writ of Certiorari. Whereas the Petitioner attempts to convince the Court there is some new or different law worthy of consideration by this Court regarding implied acquittal, there is no such pretense regarding collateral estoppel and the same transaction test. In some portions of the Petition, particularly within the Question Presented section, nothing is mentioned other than implied acquittal. The Respondent has decided to address rather than to ignore these two doctrines, anyway, because they do provide two bases, independent of implied acquittal, and each other to justify not disturbing the result reached by the Michigan courts. To consider otherwise would not be some minor modification of implied acquittal, but rather would be to undermine centuries of cases construing double jeopardy, and perhaps effectively, double jeopardy itself.

The doctrine of collateral estoppel is a basis for the opinions of both Justices Cavanaugh and Brickley. Collateral estoppel is a cornerstone of the Anglo American system of justice. The civil aspect of the doctrine is known as res judicata; the criminal aspect is known as double jeopardy. It is also based on logic, common sense and practicality. The principle is that once a matter has been adjudicated through litigation, it will not be relitigated.

The Petitioner attempts to distingish the doctrine of collateral estoppel as it applies here, particularly as it relates to Chief Justice Brickley and his focus on a rational jury. The Respondent submits that there is objective evidence that should lead one reasonably to beleive that the jury did act rationally and particularly as it relates to the aspects pertinent to collateral estoppel.

During the course of deliberations in the trial one the jury asked a question to the judge asking that the judge explain the difference between first and second degree murder. There was no other question asked, such as being able to find the Defendant guilty of both second degree murder and armed robbery. [App 7a-8a]

That the jury had honed in on the difference between first and second degree murder is clear from the exchange with the judge. The judge clearly responded to their question by explaining what armed robbery was and how a finding or not finding of armed robbery would have on the difference between first degree murder and second degree murder. The record indicates clearly that quite soon after the panel returned to the jury room with their question relating to armed robbery having been answered, they returned with a verdict. That verdict was second degree murder, only. The sequence of these transparent events and the time span leads a rational inferer to infer that the jury was acting rationally and knew full well that they were exercising an option to distingish first degree murder from second degree murder by not finding armed robbery. The jury

was not only rational, but they were true to their oath to follow the judge's instructions. There is no basis in fact for spectulating that this jury was not rational. The facts are not present here to justify the Court expressing such a lack of respect for a jury to be rational.

The Petitioner also attempts to argue that collateral estoppel does not apply as the result in trial one was not final. An aspect of collateral estoppel is that it only need to relate to an aspect or a fact material to the case and need not relate to all the aspects of a given case.

The Michigan Court of Appeals decision rendered in 1988 **Garcia 88** held that there could not be a retrial on first degree murder as doing so would violate the Defendant's protections against double jeopardy. This was in addition to reversing the conviction of second degree murder based on the fact that the verdict form and instructions did not allow for a general verdict of not guilty. The appeal of the Prosecutor to the Michigan Supreme Court was restricted to attempting to have the second degree murder conviction reinstated. The Prosecutor made absolutely no reference to a concern that upon retrial the Defendant could not be retried as to first degree felony murder. By the Prosecutor not challenging the ability of the Prosecutor to retry the matter on first degree murder, the Prosecutor conceded that a final determination had been made that double jeopardy precluded retrial on first degree felony murder aspect of the case. The Prosecutor

was thereby effectively agreeing that he was collaterally estopped from pursuing the armed robbery aspect of the case in future litigation.

Justice Cavanaugh also bases his decision on the same transaction doctrine. This is also a basis which has been accepted and followed by the United States Supreme Court. A lead case in this area is the **Grady v Corbin**, 495 US 508, 109 L Ed 2d 548, 110 S Ct 2084 (1990), case. The doctrine provdes another test to determine whether double jeapordy applies. A determination that has to be made is whether or not the Defendant was subjected to sucessive trials involving the same factual transaction.

The Prosecutor argued over the objection of the Defendant, prior to the matter being submitted to the first jury, that a jury option for a free standing verdict of armed robbery was in order, based on the admitted evidence relating to armed robbery. [App 9a]

Independant of the admission of the Prosecutor, a review of the records of the two trials would lead a fair minded person to find that armed robbery was an integral part of the factual transactions in both cases. Perhaps an indication was that the Prosecutor did not challenge that portion of **Garcia 88** that held that Garcia could not be retried on first degree felony murder; yet, there is objective evidence, to-wit: The armed robbery count before the second trial, indicative that when it came time for the then Prosecutor, Ward Clarkson, to retry the matter, he found the armed robbery aspect of the transaction to be essential in the

presentation of a coherent transaction. All this is another way of saying that Garcia, as a matter of fact, was subjected to two trials involving essentially the same facts relating to the same armed robbery allegation. Doing so was in violation of the same transaction doctrine involving double jeopardy. Violation of the same transaction doctrine was, in itself, a basis for upholding the vacatur of the armed robbery conviction in the second trial.

The last basis for not disturbing the result is based on what the Respondent considers to be actual, literal or classical double jeopardy. The Respondent recognizes that however compelling this seems to be to the Respondent, it has not been adopted or articulated by the Michigan Court System as a basis for sustaining the result.

The Respondent asks the Court to consider that there is still another basis above and beyond the bases provided by the Michigan Court of Appeals and the Michigan Supreme Court. The Fifth Amendment to the United States Constitution bars one from being twice put in jeopardy for the same crime. Doctrines construing double jeopardy have been analyzed in great detail herein. The Respondent asks the high court to consider that the violation of the Fifth Amendment is so direct and clear that there should not be a need for any sophisticated, complicated analysis. A jury that had been sworn in 1986 went into a jury room with a pen and a verdict form with Frank Garcia's name on it that contained jury verdict option for armed robbery as an element of first degree

felony murder. There also was a verdict option for armed robbery. In 1989 another jury that had been sworn was supplied with a pen and verdict form with Frank Garcia's name on it that had a jury option for armed robbery relating to the same incident as did the verdict form in 1986. Frank Garcia was twice placed in jeopardy as to the same offense. This in and of itself, and independant of any other doctrine, is double jeopardy.

Based on the multiple, but independently justifiable doctrines as set forth herein the result of the Michigan Supreme Court should not be disturbed. This is in addition to the other factors previously set forth which are a bases for this Court not to become involved.

The Respondent suggests the high Court reaffirm the essence of **Green:**

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [**Green v United States**, 355 US 184, 187-188 (1957)]

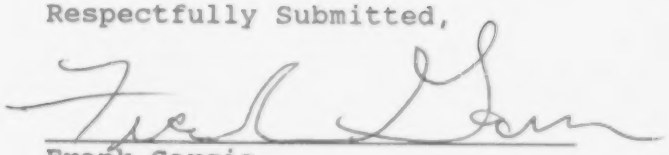
The Respondent has not only been subjected to double jeopardy, but now has been subjected to five appeals, three of which have

been instituted by the Prosecutor.

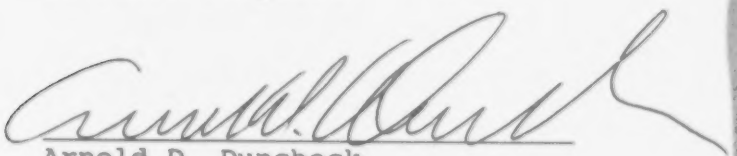
(CONCLUSION)

For all of the compelling reasons set forth the Petitioner's Request for a Writ of Certiorari should be denied.

Respectfully Submitted,



Frank Garcia,
Respondent,
In Forma Pauperis



Arnold D. Dunchock,
Attorney for Respondent

LAWYERS' OFFICES
223 N. Shiawassee Street
Corunna, MI 48817
(517) 743-5621

Thomas M. Donnellan,
Of Counsel
653 S. Saginaw Street
Flint, MI
(810) 234-4851

(PEOPLE's) APPLICATION FOR LEAVE TO APPEAL AND CONCISE STATEMENT OF PROCEEDINGS AND FACTS (FILED WITH THE MICHIGAN SUPREME COURT IN 1988)
POINT: The Prosecutor took the position before the Michigan Supreme Court that the jury was properly instructed in trial one (1).

12. On October 19, 1988 the Court of Appeals panel (Weaver, PJ; Shepherd, J; Brouilette, CirJ) filed its unpublished per curiam opinion affirming Hammond's conviction and reversing Garcia's convictions and remanding for a new trial on second degree murder and felony firearm. A photocopy of the Court of Appeals opinion is attached.

13. On all of the issues raised by Garcia and briefed by the parties, the Court of Appeals held for the People of the State of Michigan, plaintiff-appellee. However, the court on its own motion raised the issue of a defect in the jury verdict form and determined that the form deprived the jury of the opportunity to render general a verdict of not guilty. The court of Appeals found that a miscarriage of justice had occurred and reversed and remanded for a new trial, but precluded re-trial on first degree murder.

14. The People, as appellant, seek leave of this court to appeal from only that portion of the Court of Appeals opinion which reversed the Garcia convictions.

15. The Court of Appeals' decision is clearly erroneous and will cause a material injustice, MCR 7.302(B)(5). Garcia was tried on sufficient evidence before a properly instructed jury and was convicted. Yet, the People will be put to the considerable expense of an unnecessary re-trial, and the family of the victim will be put through the trauma of having to re-live this horrifying event.

MICHIGAN COURT OF APPEALS DECISION DATED OCTOBER 19,1988, REVERSING VERDICT IN TRIAL ONE (1)
POINT: The Court of Appeals holding related to the lack of a jury option of not guilty; it did not make a holding relating to a jury option allowing verdicts of both second degree murder and armed robbery.

The jury returned a verdict of guilty of second degree murder.

/The jury instructions and verdict form constituted reversible error with regard to Count I because they did not give the jury the opportunity of returning a general verdict of not guilty. If the verdict form had included a box through which the jury could have found Garcia not guilty of second-degree murder and not guilty of armed robbery, then this Court would not find that the verdict form resulted in a miscarriage of justice. Not at least giving the jury a method to make such a finding under these facts requires reversal./

We turn to whether Garcia's felony-firearm conviction can stand in light of our reversal of his second-degree murder conviction. With regard to Count I, the jury instructions and verdict form improperly failed to give the jury the opportunity to return a general verdict of not guilty. With regard to Count II (felony-firearm), the jury was given the appropriate alternatives of finding Garcia guilty or not guilty. Jury verdicts need not be consistent. People v Vaughn, 409 Mich 463; 295 NW2d 354 (1980). The jury could properly have convicted Garcia of the felony-firearm charge, while acquitting him of the underlying felony. People v Lewis, 415 Mich 443; 330 NW2d 16 (1982). However, appellate courts do not have the option of

TRIAL I VOL. VIII PAGES 127 and 128
POINT: The Prosecutor did not object to the verdict options given to the jury.

to look at the guns, write a note to the bailiff and we will have you brought back into the courtroom and you can examine the weapons, both of which are marked now as exhibits -- one of them I remember I think it was prosecution's Exhibit 13. And I don't remember the other number, but I think we all know what we're talking about.

MR. DUNCHOCK: I think it was the first defense.

THE COURT: First defense; okay.

Now, in this case, you've already been told that there's going to be a number of possible verdicts. And I prepared for you written verdict forms which will go into the jury room with you.

And as to each count, only one of the possible verdicts may be returned by you on each of those counts.

If you have all agreed upon one verdict for each count, then your foreperson should mark that verdict, and the other verdicts are to be left unmarked.

Basically, you will see that I have prepared a verdict form that states: Count I, First Degree Murder. That verdict form which, again, will go in the jury room, reads as follows.

You may return only one verdict on this charge. Mark only one box for this count. First box states: Not Guilty of First Degree Felony Murder. The next box states: Guilty of First Degree Felony Murder or Guilty of the lesser included offense of, next box states: Second Degree Murder. And the next box states: Armed Robbery.

As to Count II, possession of a firearm at the commission -- at the time of the commission of or attempted commission of a felony; that is, felony murder, your verdict forms reads: possible verdicts. You may return only one verdict on this charge. Mark only one box for this count.

First box is: Guilty of Possession of a Firearm at the time of Commission or Attempted Commission of a Felony, Felony Murder. And the next box is: Not Guilty of Possession of a Firearm at the time of the Commission or Attempted Commission of a Felony; that is, Felony Murder.

Does either counsel, Mr. McClernan or Mr. Dunchock, have any comments, objections, or exceptions to the instructions just now given to the jury?

Mr. McClernan?

MR. McCLERNAN: I have none, your Honor.

THE COURT: Mr. Dunchock?

PROSECUTOR'S ANSWER: MOTION TO QUASH

POINT: Prosecutor agreed Garcia could not be retried on first degree murder. Prosecutor thought Garcia waived claim of double jeopardy to armed robbery.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

FRANK GARCIA,
Defendant./ FILE NO. 85-5673FC

ANSWER AND OPPOSITION TO DEFENDANT'S MOTION TO QUASH ARMED ROBBERY COUNT

NOW COME the People of the State of Michigan by and through Ward L. Clarkson, Prosecuting Attorney in and for the County of Shiawassee, and in opposition to Defendant's Motion state:

1. That answering paragraph 1 of Defendant's Motion, the People admit the allegations contained therein.

2. That answering paragraph 2 of Defendant's Motion, the People admit the allegations contained therein.

3. That answering paragraph 3 of Defendant's Motion, the People admit the allegations contained therein.

4. That answering paragraph 4 of Defendant's Motion, the People admit the allegations contained therein.

5. That answering paragraph 5 of Defendant's Motion, the People admit the allegations contained therein.

6. That answering paragraph 6, the People deny the allegations contained therein and would state that defendant was in jeopardy of being convicted of Armed robbery by virtue of the Armed Robbery alternative.

7. That answering paragraph 7 of Defendant's Motion, the People admit the allegations contained therein.

8. That answering paragraph 8 of Defendant's Motion, the People admit the Court of Appeals ruled that on retrial defendant cannot be charged or convicted of First-Degree Murder,

lesser offense of Armed Robbery from going to the jury. By seeking a new trial, the defendant waives his double jeopardy claim.

9. That answering paragraph 9 of Defendant's Motion, the People admit the allegations contained therein.

10. That answering paragraph 10 of Defendant's Motion, the People admit the allegations contained therein.

11. That answering paragraph 11 of Defendant's Motion, the People state that the information now contains a count for Armed Robbery.

12. That the People incorporate by reference the attached memorandum of law.

WHEREFORE, the People pray defendant's Motion to Quash be Denied.

DATED: May 1, 1989

Ward L. Clarkson

WARD L. CLARKSON (P 36073)
PROSECUTING ATTORNEY

TRIAL ONE (1) VOL. VIII PAGES 136 and 137

POINT: The jury asked a question resulting in the judge explaining again that armed robbery was the difference between first degree felony murder and second degree murder.

and your note reads: What are the conditions for second degree murder?

And if I'm understanding the note, it is asking essentially for the Court to give you the elements of second degree murder as I've instructed; correct?

THE JURY: Yes.

THE COURT: The jury is nodding up and down affirmatively. And I am going to at this point reread the second degree murder instruction that I gave to you earlier with all of the instructions. And I'm going to reread it precisely as I gave it earl. . today, so that that will remain consistent with what you recall having been read to . .

Keep in mind that as I reread this one instruction, which is one of several instructions that I've given you so far today, that you are to take this into consideration and in the light of the rest of the instructions that I've already given to you.

You will recall that I started out then, after telling you that second degree murder is a necessarily lesser included offense of first degree felony murder, that the difference between first degree felony murder and second degree murder is that for second degree murder the Defendant Frank Garcia need not have been

in the commission of the crime of armed robbery at the time of the act which caused the victim's death.

If you find the Defendant guilty of murder, it is your duty to state the degree in your verdict; that is, that he is guilty of First Degree Murder; that is, Felony Murder, or Second Degree Murder.

To establish second degree murder, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the deceased, Timothy Roger Kiley died on or about December 3, 1985, within the County of Shiawassee, State of Michigan.

Second, that his death was caused by the Defendant; that is, that Timothy Roger Kiley died as the result of a bullet wound to the head.

Third, if you find that the death of Timothy Roger Kiley was caused by the Defendant Frank Garcia, you must determine whether the Defendant is guilty of any crime.

The killing of a human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the state of mind with which it is done.

Forth, for second degree murder, you must find that the Defendant acted with a certain state of mind

TRIAL ONE (1) VOL. VIII PAGE 6
POINT: The Prosecutor moves to have the Court instruct on armed robbery because it is such an integral part of the case.

of the greater offense; that is, it must be impossible to commit the greater without first having committed the lesser.

There is no need for the trial court to examine the evidence. A request to charge on a necessarily included offense alone triggers the obligation to charge.

Your Honor, here we are asking that the Court instruct the jury on the lesser included offense of armed robbery. It is obviously under this definition and any other reasonable definition, a necessarily included lesser offense inasmuch as it would be impossible to commit the principal offense, that is here felony murder, without having first committed the named offense, underlying felony; that being felony -- excuse me, armed robbery.

And so, therefore, the People submit that this fits squarely under the law in Chamblis, Ora Jones, and also in the Wilder case, which also included felony murder based upon a robbery.

THE COURT: Thank you, Mr. McClernan.

Mr. Dunchock, any response or comments?

MR. DUNCHOCK: The position of Frank Garcia is that he opposes anything other than the mandatorialy included offense, second degree murder, pursuant to